

VZCZCXRO6119
RR RUEHNZ
DE RUEHWL #0059/01 0610155
ZNR UUUUU ZZH
R 020155Z MAR 09
FM AMEMBASSY WELLINGTON
TO RUEHC/SECSTATE WASHDC 5778
INFO RUEHNZ/AMCONSUL AUCKLAND 1925
RUEHBY/AMEMBASSY CANBERRA 5462
RUEHDN/AMCONSUL SYDNEY 0804
RUCPDO/USDOC WASHDC 0281
RUEATRS/DEPT OF TREASURY WASHDC
RUEHRC/DEPT OF AGRICULTURE WASHDC

UNCLAS SECTION 01 OF 03 WELLINGTON 000059

SENSITIVE
SIPDIS

STATE FOR STATE FOR EAP/ANP, EEB/TPP/IPE TMCOWAN, STATE PASS TO
USPTO, USTR JENNIFER GROVES AND COMMERCE FOR CASSIE PETERS
ITA/MAC/OIPR

E.O. 12958: N/A

TAGS: [ECON](#) [ETRD](#) [KIPR](#) [NZ](#)

SUBJECT: 2009 SPECIAL 301 REVIEW - NEW ZEALAND

Ref: State 8410

11. (U) Summary: Post recommends that New Zealand (GNZ) not/not be placed on the Special 301 List in 2009. New Zealand has a comprehensive Intellectual Property Rights (IPR) regime that strives to meet its WTO TRIPS obligations with respect to patents, copyright and trademark protection, and has in recent years amended and updated a number of pieces of intellectual property legislation. A new Patents Bill was introduced to Parliament on July 9, 2008 and will, when enacted, replace the 1953 Patents Act. It is expected that the Bill will be in force by late 2009. The Copyright (New Technologies) Amendment Act was passed in April 2008 and most of its provisions came into force by October 2008. Full implementation with respect to digital data protection via the internet is expected by the end of March 2009. The New Zealand Government has proactively cooperated with and values the opportunity to work constructively with the United States in a number of international IPR fora. It was one of the first countries to join the U.S. in developing the Anti-Counterfeiting Trade Agreement (ACTA) and remains a fully engaged member of the WTO TRIPS Council. Placing New Zealand on the Special 301 list may prove to be counter-productive as it likely will result in a defensive rather than consultative exchange. End summary.

Access to Pharmaceuticals

12. (SBU) While the U.S. pharmaceutical industry (PhRMA) urges that New Zealand be placed on the priority watch list (PWL) in 2009, Post continues to believe that the industry's concerns with regard to access to New Zealand's market stem primarily from the cost containment strategies for subsidized drugs that are a part of the National Medicines Strategy (NMS). The government-affiliated Pharmaceutical Management Agency (PHARMAC) is mandated to spend less than its budget allows, and the U.S. pharmaceutical industry may have a number of legitimate complaints about its treatment in PHARMAC's purchasing process. However, these industry concerns are not IP problems per se. While Post will continue to work to improve access for U.S. pharmaceuticals in the New Zealand market, we believe this should be dealt with as a market-access barrier and not as a failure to protect intellectual property.

13. (U) In October 2005, the United Future Party announced that it had secured an agreement from the Labour Party to develop a national medicines strategy as part of Labour's coalition negotiations to form a government. Following extensive consultation, the Government released its improved access to medicines strategy ("Medicines New Zealand"), and an associated action plan in December 2007. The strategy is intended to provide a framework to support a sound and transparent decision-making process enabling greater access to "appropriate" medications. The strategy is also based on principles

of equity, effectiveness, confidence, value for money, affordability and transparency and aims to deliver a coherent approach to medicines issues in New Zealand. The plan's goal is to provide the highest quality, safest and most effective medicines for New Zealanders.

14. (U) With the election of the National Party in November 2008, the United Future Party again secured commitment to the strategy through its supply and confidence agreement as a coalition minority party. Therefore, the New Zealand Government remains committed to working with stakeholders to investigate ways to improve access to higher-cost specialized medicines, and has recently announced it would increase spending on medicines by NZ\$180 million over the next three years, starting July 2009. There are currently no undue delays in assessing applications for market authorization in New Zealand. The New Zealand Government's Medicines and Medical Devices Safety Authority (Medsafe) is already meeting its goal of assessing applications for market access within 200 days of receipt.

Patent Protection

15. (U) The grant of patents in New Zealand is currently governed by the Patents Act 1953. A new Patents Bill was introduced to Parliament on July 9, 2008 and will, when enacted, replace the 1953 Act. The Bill will be referred to a Select Committee for review in early 2009, which will likely seek public submissions as part of its consideration of the new law by May and is expected to be in force by end of 2009. The Patent term will remain at twenty years from filing with no provision for extension.

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16. (U) The Patents Bill requires that, to be patentable, an invention must be a "manner of manufacture", be novel, involve an inventive step, and be useful. The Bill excludes certain subject matter from patent protection:

--Human beings and biological methods for their generation;

--Methods of treatment of human beings by surgery or therapy, or methods of diagnosis practised on human beings;

--Inventions whose commercial exploitation would be contrary to morality or public policy;

--Plant varieties.

17. (U) The "prior art base" for novelty and inventive steps includes all material made available to the public in any form anywhere in the world. This replaces the "local" novelty standard applied under the 1953 Act. Patent applications will be examined for inventive step and utility; there is no examination for these criteria under the 1953 Act. The Bill will remove the 1953 Act provision for pre-grant opposition and will introduce a "re-examination" provision which can be invoked at any time after acceptance of an application. Re-examination will be limited to issues of novelty and inventive step based on documentary prior art. The 1953 Act post-grant opposition provisions will be expanded and it will be possible to invoke post-grant opposition at any time during the patent term. The current provision for revocation of a patent through the courts will be retained. The Bill also provides for the establishment of a Maori Advisory Committee to advise the Commissioner of Patents where patent applications involve traditional knowledge and indigenous plants and animals.

The Copyright (New Technologies) Amendment Act 2008

18. (U) The Copyright (New Technologies) Amendment Act was passed in April 2008 and most of its provisions came into force in October of that year. A number of changes were made to the Bill following its report back from the Select Committee and prior to its final passage through Parliament. In particular, changes were made to the Internet Service Provider (ISP) liability provisions in response to public concerns. Modifications included:

-- An ISP will not be protected from liability if it has reason to believe that material on its clients' websites is infringing, regardless of whether they have received a notice from a rights-holder to that effect;

-- A requirement for ISPs to have and reasonably implement a policy for termination of the accounts of repeat infringers was inserted into the Bill; and

-- The offence provision for sending false or misleading notices to ISPs which was inserted at Select Committee was removed from the Bill.

¶9. (U) On February 23, five days prior to the full implementation of the ISP provisions (sections 92 a and c) in the new Copyright Bill, Minister of Commerce Simon Power suspended the ISP sections of the law from coming into full force for 30 days (end of March 2009). The Minister's action will give the IP rights holders represented by the Recording Industry Association of New Zealand (RIANZ) and the Australasian Performing Rights Association (APRA) additional time to negotiate with the ISP trade association, the Telecommunication Carriers Forum (TCF) a mutually agreeable code of practice for terminating the internet access of users accused of infringing copyrights. Once the code of practice is adopted, the government will monitor its efficacy during the first six months after the law's enactment.

¶10. (U) The provisions relating to technological protection measures (TPMs) remain largely unchanged in the bill. The Act as implemented reflects New Zealand's concern that TPMs should not be protected to the extent that they restrict acts which are seen as not protected by copyright law. The provisions of the Act have therefore been drafted to ensure that access to a work for non-infringing purposes, including the exercise of a permitted act, is retained.

The Trademarks (International Treaties and Enforcement) Bill

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¶11. (U) The Trademarks (International Treaties and Enforcement) Bill was introduced to Parliament in 2008. The Bill contains provisions to enhance the existing enforcement provisions in the Trade Marks Act and Copyright Act 1994 to further deter counterfeiting of registered trade marks and piracy of copyright protected works. The Bill is expected to be referred to a Select Committee in 2009.

Enforcement

¶12. (U) The GNZ remains committed to enforcing its IP laws adequately and effectively. In most instances, the government responds to complaints raised by rights holders against IP infringers. The government set up a new office within New Zealand Customs in 2007 that is exclusively dedicated to IP enforcement issues. Currently, New Zealand Customs can confiscate and destroy pirated products if the holder of the trademark or copyright has requested that Customs detain the goods. That request is valid for five years and can be renewed. Almost all the infringing goods imported into New Zealand originated in Asia, particularly China. While it appears that CDs and DVDs are increasingly being copied to order within New Zealand (over the internet), making detection of local production increasingly difficult, the copyright industry has an ongoing cooperative dialogue with local authorities to better police IPR as new forms of piracy are detected.

Anti-Counterfeiting Trade Agreement

¶13. (U) New Zealand joined with the United States and a number of its major trading partners, including the Australia, Canada, the European Union, Japan, Korea, Mexico, and Switzerland, to help in the development of the plurilateral Anti-Counterfeiting Trade

Agreement ("ACTA"). The government of New Zealand has made several public statements regarding ACTA, saying "it would establish a new international legal framework with the goal of setting a new, higher benchmark for intellectual property rights enforcement." At the fourth negotiating round in Paris in December 2008, New Zealand reaffirmed its commitments to negotiate an agreement to combat global infringements of IPR, particularly in the context of counterfeiting and piracy, by increasing international cooperation, strengthening the framework of practices that contribute to effective enforcement, and strengthening relevant IPR enforcement measures themselves.

¶14. (U) Recommendation: Post maintains that, despite delays in the pending Copyright Bill's ISP provisions and the Patents Bill's slowed progress because of last year's election cycle, there remains a strong commitment on the part of the GNZ to continue to improve its IP regime and bring it into conformance with international standards. The GNZ's enforcement of current IP laws also reflects the government's proactive stance as they learn and adapt to help stem new forms of piracy. While there is additional work to be done to strengthen the law and enhance enforcement, Post recommends the better course of action is to continue engagement with the GNZ and monitor the progress of IP legislation rather than place New Zealand on this year's watch list. End Recommendation.

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